FILE COPY

Office - Supreme Court, U. S
FILED
NOV 8 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 41.

STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONER,

VS.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS, ETC.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

Petition for Certiorari Filed May 7, 1937.

Certiorari Granted October 11, 1937.

GEORGE W. WYLIE,
STUART B. WARREN,
St. Petersburg, Florida,
Counsel for Petitioner.

INDEX

Subject Index

Opinions Below 1
Jurisdiction 2
Statement of the Case 3
Specifications of Error 4
Argument 4
Conclusion 13
Appendix 14

Cases Cited

American Surety Co. vs. Lawrenceville Cement Co., (Cir. Ct., D. Maine) Aug., 1901, 110 Fed. 717 ..... 7, 10

American Surety Co. vs. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977 9

Brogan vs. National Surety Co., 246 U. S. 257-263, 38 Sup. Ct. Rep. 250, 62 L. Ed. 703 ..... 5, 6

Blyth-Forco Co. vs. Free, 46 Utah 233, 148 Pac. 427 9

City of Stuart vs. American Surety Co., (C. C. A. 5th) 38 F. (2d) 193 12

Equitable Surety Co. vs. U. S., 234 U. S. 448, 34 Sup. Ct. Rep. 803, 58 L. Ed. 1395 ..... 6, 8

Fidelity Ins. Trust Co. vs. Roanoke Iron Co., (1896) 81 Fed. 439 5

Fry vs. P. Bannion Sewer Pipe Co., 179 Ind. 309, 101 N. E. 10 9

Hill vs. American Surety Co., 200 U. S. 197-205, 26 Sup. Ct. Rep. 168, 50 L. Ed. 437 5

Illinois Surety Co. vs. John Davis Co., 244 U. S. 376, ~~36~~ Sup. Ct. Rep. ~~321~~, 61 L. Ed. 1206 ..... 5, 6

Mandel vs. U. S., 4 F. (2d) 629 (C. C. A. 3rd) 2, 9

Maryland Casualty Co. vs. Ohio River Gravel Co., (C. C. A. 4th) 20 F. (2d) 514, on rehearing 21 F. (2d) 744 11

Seventh National Bank vs. Shenandoah Iron Co., (1887) 35 Fed. 436 5

Title Guaranty & Trust Co. vs. Crane, 219 U. S. 24, 31 Sup. Ct. Rep. 140, 55 L. Ed. 72 ..... 5-6, 7, 9, 10

Title Guaranty & Trust Co. vs. Puget Sound Engine Works, (C. C. A. 9th) 163 Fed. Rep. 168 ..... 2, 7, 9, 10

United States for the Use of Hill vs. American Surety Co., 200 U. S. 197, 26 Sup. Ct. Rep. 168, 50 L. Ed. 437 5

United States Fid. & Guar. Co. vs. Golden Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. Rep. 142, 48 L. Ed. 242 9

United States vs. Hyatt, (C. C. A. 5th) 92 Fed. 442 ..... 9, 10

United States vs. Morgan, 111 Fed. 474 11

Wisconsin Brick Co. vs. National Surety Co., 164 Wis. 585, 160 N. W. 1044, L. R. A. 1917C, 912 ..... 5, 9

STATUTES CITED

Judicial Code, 240a as amended by Act of February 13, 1925, 43 Statutes 938 2

Acts Aug. 13, 1894, 28 Stat. 278, U. S. C. A., Title 40, Sec. 270 ..... 3, 4, 5, 15

Acts Aug. 24, 1935, Chapter 642, Sec. 1, 49 Stat. 793, U. S. C. A., Title 40, Sec. 270a 3, 17

Rule 38, Subparagraph (b) of Paragraph 5 2

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 41.

STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONER,

VS.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS, ETC.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

I.

THE OPINIONS OF THE COURTS BELOW.

There was no official opinion written by the district court judge. His action in granting judgment is set forth in the record (Rec. 22). The opinion of the circuit court

of appeals is set forth in the record (Rec. 27, 28) and is reported in 89 F. (2d) 658.

II.

JURISDICTION.

1. The petition for writ of certiorari was filed on May 7, 1937, which set forth that the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case was in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case and in former cases, is in direct conflict with the decisions of the Circuit Court of Appeals in the Ninth Circuit in the case of *Title Guaranty and Trust Company* v. *Puget Sound Engine Works,* 163 Fed. Rep. 168, and in direct conflict with a decision of the United States Circuit Court of Appeals of the Third Circuit in the case of *Mandel* v. *United States,* 4 F. (2d) 629, in which said cases a claim for the allowance of freight bills, under an exactly similar bond, was denied.

2. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code, Section 240a, as amended by the Act of February 13, 1925, 43 Statutes 938 (U. S. C., Title 28, Sec. 347a).

3. Section 240a of the Judicial Code, as amended, clearly confers jurisdiction upon this court to bring up a case of this character from the circuit court of appeals by certiorari and Subparagraph (b) of Paragraph 5 of Rule 38 of this court clearly recognizes such right.

Writ of certiorari was granted on October 11, 1937.

III.

STATEMENT OF CASE.

Your petitioner is the surety on a post-office construction bond given pursuant to Act of August 13, 1894, 28 Statutes 278 and amendments thereto, Title 40, U. S. C. A., Section 270 (repealed with a saving clause and a similar statute, with applicable language substituted therefor, Act August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A. 40, Section 270a) (see Appendix).

Respondent is a carrier which, having transported materials used in the work, sued upon the bond for its unpaid freight bills (Declaration, Rec. 1 to 20, incl.).

Petitioner's demurrer (Rec. 21) that a railroad company, as to freight charges, is not within the meaning of the bond, "a corporation who has furnished labor or materials used in the construction or repair of any public building or public work" was overruled, and the facts being admitted, judgment went for the respondent in the district court (Rec. 22).

From that judgment, appeal was taken by the petitioner to the United States Circuit Court of Appeals for the Fifth Circuit (Rec. 23), which, after hearing, affirmed the judgment of the United States District Court (Rec. 27, 28, 29) 89 F. (2d) 658.

The only error assigned in the circuit court of appeals in support of petitioner's appeal, questioned the ruling of the lower court in its decision that freight charges were within the meaning of the bond "a cor-

poration which furnished labor or materials used in the construction or repair of any public building or public work."

The petition for writ of certiorari was filed May 7, 1937, and was granted on October 11, 1937 (Rec. 32).

IV.

SPECIFICATIONS OF ERROR.

Assignments of error (Rec. 22) are as follows:

1. The court erred in overruling plaintiff in error's demurrer to the declaration.

2. The court erred in entering final judgment against the plaintiff in error.

V.

ARGUMENT.

FIRST AND SECOND ASSIGNMENTS OF ERROR.

It is our contention that freight charges do not come within the terms of a bond of a contractor on public works exacted pursuant to the Acts of Congress (Section 270, Title 40, U. S. C. A.) conditioned to "make payments to all persons supplying the principal with labor and materials in the prosecution of the work."

On reason and principle "freight" cannot be considered "labor and materials" without doing violence by judicial construction to the plain terms of the statute and bond, and the court should not depart from the language used and read an additional term into the bond, not justi-

fied by the language used and the circumstances of the giving of the bond.

The act in question was originally entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works" (see footnote appended to Sec. 270, Title 40, U. S. C. A.), and should be interpreted in the light of the declared purpose and the conditions existing prior to the enactment of the statute and the evils sought to be cured.

Before the enactment, manual laborers and materialmen had no rights of lien, by statute or otherwise, against public works, as they did against similar private works. Railroad companies, however, had a right at common law —a common law carrier's lien—and could enforce payment of its charges by retaining possession of the goods and selling them to satisfy its charges. Indeed, under the lien laws of the states, railroads have never had any right of lien against private buildings for the payment of freight charges; their lien on the materials being considered sufficient protection. *Seventh National Bank* v. *Shenandoah Iron Co.*, (1887) 35 Fed. 436; *Fidelity Ins. Trust Co., etc.*, v. *Roanoke Iron Co.*, (1896) 81 Fed. 439; *Wisconsin Brick Co.* v. *National Surety Co.*, 164 Wis. 585, L. R. A. 1917C, 912, 160 N. W. 1044.

The act in question has been before this court in the cases of *United States Use of Hill* v. *American Surety Co.*, 200 U. S. 197-205, 50 L. Ed. 437, 26 Sup. Ct. Rep. 168; *Brogan* v. *National Surety Co.*, 246 U. S. 257-263, 38 Sup. Ct. Rep. 250, 62 L. Ed. 703; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376-383, 61 L. Ed. 1206, ~~36~~ 37 Sup. Ct. Rep. ~~321~~ 614; *Title Guaranty & Trust Co.* v. *Crane Co. et*

al., 219 U. S. 24, 55 L. Ed. 72, 31 Sup. Ct. Rep. 140; *Equitable Surety Co.* v. *U. S.*, 234 U. S. 448, 34 Sup. Ct. Rep. 803, 58 L. Ed. 1395.

In the case of *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197-205 (*supra*), this court held for a liberal construction of the bond and allowed claims for labor and materials furnished indirectly to the job, that is, to subcontractors as well as those furnished directly to the contractor. In stating its ruling, this court said (220 U. S. 202):

> "such a contract should be interpreted liberally in favor of the subcontractor with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud * * * or to cases not otherwise under the scope of the undertaking * * * and the rule which permits a surety to stand upon his strict legal rights, when applicable, does not prevent a construction of the bond with a view to determine the fair scope and meaning of the contract in the light of the language used and the circumstances surrounding the parties."

In *Brogan* v. *National Surety Co.* (*supra*), 246 U. S. 257, the court allowed claims for food furnished the contractor to feed his laborers where the site of the work was "in a comparative wilderness and (the contractor) was compelled to furnish board and lodging to his laborers."

In *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376 (*supra*), this court allowed rental price of equipment used by the contractor on the job, which rental price included freight advanced by the owner of the equipment.

In *Title Guaranty & Trust Co.* v. *Crane et al.*, 219 U. S. 24, 55 L. Ed. 72, 31 Sup. Ct. Rep. 140 (*supra*), affirming *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works*, 163 Fed. Rep. 168, the claim for which recovery was allowed was for cartage and towage and claims for drawings and patterns. In that case this court said (219 U. S. 34):

> "Next it is objected that certain claims are not entitled to the benefit of the bond, either because they had a lien or because the service was too remote. Of the former class are claims for cartage and towing to the spot where the work was going on. We concur with Judge Putnam in the case of the *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed. 717, that in these smaller matters, the objection, if carried to an extreme, would defeat the purpose of the statute, that such liens ordinarily are not insisted upon and that it would be unreasonable to let the statute interfere with the convenience of minor dealings in such methods as the usual practices establish."

This reasoning, carried to its logical conclusion, would exclude dealings with a railroad company, which has a lien and ordinarily insists on it, by refusing to deliver materials until its claim is paid.

It is significant that the Circuit Court of Appeals of the Ninth Circuit, in the case below, refused to allow a claim for advance of freight (see *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works*, 163 Fed. Rep. 168, which ruling this court was not called upon to review) and that this court expressly approved the ruling of Judge Putnam in the *American Surety Co.* v. *Lawrenceville Cement Co. Case*, 110 Fed. 717, who had

denied the claim of a carrier for freight because they were protected by their common law carrier's lien.

We respectfully call the court's attention to the fact that in the foregoing cases, this court has not extended the coverage of the bond to those claimants who were otherwise protected by a common-law lien, and has extended it *only* to those who have indirectly supplied labor and materials necessary to the job and who did not have a lien at common law, and upon whom there was a real hardship in construction on government property.

In *Equitable Surety Co.* v. *U. S.*, 234 U. S. 448, 58 L. Ed. 1395, 34 Sup. Ct. Rep. 803, this court said with reference to the purpose of the statute in question here:

> "The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanics' lien in case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and materials will be furnished because of the assurance that the claim will be paid."

This language cannot be construed to cover a common carrier who was already protected by a common-law carrier's lien and who was forbidden by law to grant preferential freight rates.

The rule requiring a contractor's bond to be given a liberal construction does not mitigate the principle that contracts should be so construed as to give effect to the intention of the parties as manifested by the in-

strument, but merely means that in case of ambiguity or doubt as to the meaning of any phrase or term, the doubt is to be resolved against the surety for profit. *Blyth-Forco Co.* v. *Free,* 46 Utah 233, 148 Pac. 427; *Fry* v. *P. Bannion Sewer Pipe Co.,* 179 Ind. 309, 101 N. E. 10; *American Surety Co.* v. *Pauly,* 170 U. S. 133, 42 L. Ed. 977, 18 Sup. Ct. 552; *United States Fidelity & Guaranty Co.* v. *Golden Pressed Brick Co.,* 191 U. S. 416, 48 L. Ed. 242, 24 Sup. Ct. Rep. 142.

In *Wisconsin Brick Co.* v. *National Surety Co.,* 164 Wis. 585, 160 N. W. 1044, L. R. A. 1917C, 912, the Supreme Court of Wisconsin denied a claim for freight under a similar law on the ground that the law was intended to give security to those who otherwise would have no security; not to give additional claim to a party who was amply secured by its carrier's common-law lien.

The Circuit Courts of Appeal of the United States have interpreted the federal statute in question, commonly known as The Heard Act and have denied the claim of a common carrier for freight charges in the following cases: *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works,* 163 Fed. 168 (C. C. A. 9th) (affirmed in *Title Guaranty & Trust Co.* v. *Crane et al.,* 219 U. S. 24, *supra,* without passing on the question). *United States* v. *Hyatt,* 92 Fed. 442 (C. C. A. 5th, since expressly repudiated by the Circuit Court of Appeals for the Fifth Circuit). *Mandel* v. *United States,* (C. C. A. 3rd) 4 F. (2d) 629.

In the *Hyatt Case* (*supra*), the court reasoned that the intent of Congress was to protect "labor used directly upon the public work" and that "Congress could not have intended to include in the term 'labor' as used in the act, the freight charges of a railroad on materials carried by it. The railroad is abundantly protected by its lien on freight and Congress did not contemplate that a charge for transportation by a railroad would be made against the work and certainly not when the carrier was fully secured otherwise."

In the *Title Guaranty & Trust Company* v. *Puget Sound Engine Works* (*supra*) case, the court denied the claim of a transfer company for freight advanced by it, reasoning as did Judge Putnam, in the case of *American Surety Co.* v. *Lawrenceville Cement Co.*, (C. C. D. Maine, Aug., 1901) 110 Fed. 717, which it quotes:

> "First, that the transportation for considerable distances in the regular course, by the ordinary lines of either steam or rail, cannot easily be brought within the words of the statute 'supplying labor or materials,' and, second, inasmuch as carriage of that character, especially under an ordinary bill of lading or its equivalent, creates a well-recognized lien for its freight, the equitable rule would apply that a carrier, under such circumstances, cannot give up his cargo and enforce his claim against a mere surety after he has so placed himself that the surety cannot be subrogated to the security which the law gave."

It is to be noted in this connection that the reasoning of the Lawrenceville case is also quoted with approval by the Supreme Court of the United States in the *Crane Case* (*supra*).

In the Mandel case, the railroad tracks did not extend to the point of discharge but only to the boundary of a government reservation, at which point the cars were turned over to a government railroad and delivered by it to the contractor. Thus the railroad did not have an opportunity to assert its lien, at the time of final delivery. Notwithstanding this hardship, the Court of Appeals of the Third Circuit refused to allow the claim for freight charges, reasoning that the words "labor and materials used by the Congress * * * are plain words of well-understood meaning, and in the common use and acceptance * * * freight and car demurrage are not described or embraced by the words 'labor and materials,'" and, as in the Hyatt case, that the language and purpose of the bond indicated that it was for the protection only of those not otherwise protected; and moreover, that there was no call for the exercise of judicial construction; that "neither the words of the bond allow, nor the spirit and purpose of the law require, that judicial construction to enlarge or construe the words 'labor and materials' so as to 'include freight and demurrage.'"

The materialman who prepays the freight has been allowed freight charges as part of the purchase price, in the cases of *Maryland Casualty Co.* v. *Ohio River Gravel Co.*, 20 F. (2d) 514 (C. C. A. 4th), on rehearing 21 F. (2d) 744; *U. S.* v. *Morgan*, 111 Fed. 474.

In the Ohio River Gravel Company case, the court reasoned that the seller had no common-law lien for freight advanced and was thus within the words of

the bond and spirit of the act. This case does not repudiate the doctrine of the Lawrenceville Cement Company case, for the court was careful to expressly recognize that doctrine and point out the distinction. It is also to be noted that the court did not have before it the precise question which this court now has before it; namely, a construction of the federal statute in question, but had before it a construction of a West Virginia statute.

The Circuit Court of Appeals of the Fifth Circuit, in the case of the *City of Stuart, for the Use of Florida East Coast Railroad Company* v. *American Surety Company,* 38 F. (2d) 193 (the precedent for that court's later decisions), overruled by implication the rule previously declared by it in the *Hyatt Case* (*supra*), in construing a bond given pursuant to a Florida statute.

The court gives as its reasons for extending the operation of the words of the statute by judicial construction so as to cover freight charges, first, that there was no reference in the statute to liens and that protection was expressly extended to all persons who furnished the named things; that the nature of the work done in transportation was not such as to prevent its being labor and that the freight, by whomever paid, enters into the cost of the materials and that the claim of unjust prejudice to the surety was a fallacy because the surety could not take any advantage by way of subrogation.

They justify their extension of the language by judicial construction, by referring to the decisions of the

Supreme Court, some of which are analyzed in this brief and say that that is their justification for a liberal construction.

None of the cases referred to, however, as we have hereinabove pointed out, go so far as to allow freight charges to a common carrier or go so far as to depart from the scope of the words and the spirit of the act. That court completely ignores the fact that neither the words of the bond, nor the spirit and purpose of the law require judicial construction to enlarge or construe the words to include freight.

VI.

CONCLUSION.

In conclusion, it is respectfully submitted that the intention of Congress, as interpreted by this court and by the Circuit Court of Appeals of the Ninth and Third Circuits, was to protect those persons, and only those persons, who would otherwise suffer extreme hardship, that is, those persons who could not protect themselves by obtaining a lien on government property, and for which services they would ordinarily be unable to protect themselves. In view of the fact that railroad companies were otherwise protected, by their lien for freight, there is no call for an extension by judicial construction of the plain words of the act and bond.

The judgment of the court below should be reversed.

Respectfully submitted,

GEORGE W. WYLIE,
STUART B. WARREN,
St. Petersburg, Florida,
Counsel for Petitioner.

APPENDIX.

Acts August 13, 1894, c. 280, 28 Stat. 278; Feb. 24, 1905, c. 778, 33 Stat. 811; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167, U. S. C. A. 40.

"Sec. 270. BONDS OF CONTRACTORS FOR PUBLIC BUILDINGS OR WORKS; RIGHTS OF PERSONS FURNISHING LABOR AND MATERIALS.

Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay

the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution; Provided, that where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later; And Provided Further that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be

made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing, the surety will be relieved from further liability; Provided Further, that in all suits instituted under the provisions of this section, such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

Acts August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A. 40.

"Sec. 270a. SAME; WAIVER OF BONDS COVERING CONTRACT PERFORMED IN FOREIGN COUNTRY.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to

the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor."

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000, the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.